

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7316

Investigation into regulation of Voice over)
Internet Protocol ("VoIP") services)

Order entered: 7/29/2011

ORDER RE: INTERVENTIONS

In this Order, I dispose of three intervention motions: I deny the requests for intervenor status of MCImetro Access Transmission Services LLC, d/b/a Verizon Access ("Verizon Access"), and the Voice on the Net Coalition ("VON"), but I grant intervenor status to Green Mountain Power Corporation ("GMP").

Procedural Background

On May 12, 2011, VON filed a motion to intervene in this docket.¹

On May 18, 2011, VON and Verizon Access filed a motion for leave for Glenn S. Richards, Esq., and Alexander Moore, Esq., to appear *Pro Hac Vice* in this proceeding.²

On May 19, 2011, a status conference was convened to structure the second phase of this investigation as directed by the Vermont Public Service Board ("Board").

On May 24, 2011, Verizon Access filed a motion to intervene in this docket.³

On June 1, 2011, GMP filed a motion to intervene.⁴

1. Hereinafter "VON Motion."

2. Having received no objection to the motion for *Pro Hac Vice* admission of Attorneys Richards and Moore, the motion hereby is granted.

3. Hereinafter "Verizon Access Motion."

4. Hereinafter "GMP Motion."

On June 6, 2011, VON and Verizon Access filed a joint amendment to their respective motions to intervene in this proceeding.⁵

On June 22, 2011, the Independents filed a response opposing the VON Motion, the Verizon Access Motion and the Joint Intervention Motion.⁶

Also on June 22, 2011, the Vermont Department of Public Service ("Department") filed a response opposing the Joint Intervention Motion.⁷

Legal analysis

In proceedings before the Board, intervention motions are governed by Board Rule 2.209, which provides as follows:

(A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant demonstrates a substantial interest which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

(B) Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

5. Hereinafter the "Joint Intervention Motion."

6. Hereinafter the "Independents Reply." The Independents are a group comprised of the following members: Franklin Telephone Company; Ludlow Telephone Company; Northfield Telephone Company; Perkinsville Telephone Company; Shoreham Telephone Company; Topsham Telephone Company, Inc.; Vermont Telephone Company, Inc.; and Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom.

7. Hereinafter the "DPS Reply."

The motions filed by VON and Verizon Access refer generally to Board Rule 2.209 — they do not specify whether leave to intervene is being sought "as of right" or on a "permissive" basis. As neither VON nor Verizon Access has asserted a right to intervene in this proceeding, I will review their respective motions pursuant to the "permissive" intervention standard.⁸

The VON Motion

VON identifies itself as "a trade association of Internet communications companies, some of whom may now, or may in the future, provide VoIP services in [sic] which the Board might define as VoIP services."⁹ As such, VON asserts that it has "a substantial interest in the extent to which the Board determines to regulate VoIP services in Vermont, and that interest may be adversely affected by the outcome of this proceeding."¹⁰ While acknowledging that it must "take the case as it finds it" and therefore cannot, at this point, challenge the Board's prior jurisdictional determination in Phase I of this proceeding, VON nonetheless seeks an opportunity in Phase II "to argue that the Board should not exercise any regulatory authority over VoIP services, as telecommunications services or otherwise."¹¹ VON contends that no alternative means exist for representing its interest, which will not be adequately represented by any other party. Finally, VON maintains that granting its motion will not result in undue delay in this proceeding.¹²

The Department opposes VON's request to intervene. The Department asserts the membership of VON consists only of "nomadic" VoIP providers.¹³ The Department points out

8. Neither the VON Motion nor the Verizon Access Motion satisfies the requirements of the first two criteria for intervention "as of right" as they do not assert either conditional or unconditional statutory grounds for a right to intervene. The third criterion set forth in Board Rule 2.209(A)(3) is substantively similar to the standard for "permissive" intervention.

9. VON Motion at 1. The VON Motion does not explain why VON has not stated for certain whether any of its members in fact do or will provide VoIP service in Vermont. Nor does the VON Motion specify whether the members of VON are companies who provide VoIP service on a "fixed" or "nomadic" basis, or whether the group represents both types of VoIP service providers.

10. VON Motion at 1.

11. VON Motion at 2.

12. VON Motion at 1.

13. DPS Reply at 1. The Independents, in turn, believe that VON's membership consists of only two members, namely, AT&T — a "nomadic" VoIP provider who is already a party to the case — and Comcast, a "fixed" VoIP

that interests of "nomadic" VoIP providers are not at issue in Phase II of this proceeding, given the Board's determination in Phase I that its state-law-based jurisdiction to regulate "nomadic" VoIP has been preempted by federal law. Therefore, the Department questions whether VON has a sufficient interest in this proceeding for purposes of intervention because Phase II is intended to address "only those services which the Board has jurisdiction to regulate, which is to say fixed VoIP services."¹⁴

The Independents also oppose the VON Motion. According to the Independents, VON's interest in this proceeding is only "speculative" because it is a trade association with some members who "may now" or "may in the future" provide VoIP services that the Board may define as regulated services under state law.¹⁵ The Independents further argue that VON has failed to cite a substantial interest that will not be adequately represented by other VoIP providers who have participated in the proceedings to date.¹⁶

Turning first to the question of whether VON has demonstrated a substantial interest in this proceeding, I find that this element has been met. VON's stated interest is to ensure that VoIP service remain unregulated at the state level. To this end, VON seeks an opportunity to shape state regulatory policy by persuading the Board that it "should not exercise any regulatory authority over VoIP services, as telecommunications services or otherwise."¹⁷ This interest is identical to the positions taken by AT&T and Comcast in Phase I of this proceeding.

Turning next to VON's assertion that no party will adequately protect its interest and that no other means exist for protecting that interest beyond allowing VON to permissively intervene, I do not find these elements have been met. First, as noted above, there are other parties in this

service provider. Independents Reply at 5.

14. DPS Reply at 1-2. The Department would not oppose VON's intervention if there were a showing that VON in fact represents providers of "fixed" VoIP services. *Id.* at 2. To date, VON has taken no steps to make such a showing.

15. Independents Reply at 4.

16. Independents Reply at 4 (citing the participation in this docket of AT&T as a "nomadic" VoIP provider, and Comcast as a "fixed" VoIP provider.)

17. VON Motion at 2.

docket who are VoIP service providers and who share VON's opposition to state-law-based regulation of VoIP service. Because VON has offered no reason for intervening beyond opposing state-law-based regulation of VoIP, I find it appropriate to give heightened consideration to the fact that these other parties of record have made arguments in this proceeding that are expressly designed to advance the interest shared by VON in immunizing VoIP services from state-level regulation.¹⁸

Secondly, the VON Motion fails to demonstrate why the VoIP providers who already are parties to this proceeding will not adequately protect the interest they share with VON. The VON Motion summarily predicts that its interest will be inadequately protected by the existing parties, but VON has offered no specific information or analysis to support this argument.

Finally, I note that VON only proposes to participate in this case by "filing and responding to briefs on substantive and procedural issues before the Board." VON does not expect to file testimony or to be subject to discovery thereon. However, VON nonetheless seeks "full rights of participation as a party," to include, presumably, the right of appeal.¹⁹ I appreciate that VON has offered to limit its participation in this manner in order to "minimize the administrative burden" of its intervention on the Board and the existing parties.²⁰ However, as I explained in the context of denying an earlier intervention motion in this Docket, I cannot condone asymmetrical participation by a party to the case. If a party wishes to exercise the right to advocate for certain policies and legal conclusions, then that party must assume the concomitant responsibility of permitting its policy proposals and legal positions to be tested by party-opponents.²¹

18. *Helgeland v. Wisconsin Municipalities, et al.*, 307 Wis.2d 1, 44-45; 745 N.W.2d 1, 22 (2008)("If a movant's interest is identical to that of one of the parties, . . . a compelling showing should be required to demonstrate that the representation is not adequate. When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential intervenor.")

19. VON Motion at 3. VON expressly stated in its motion that it "does not concede that VoIP and or IP-enabled services are subject to the Board's jurisdiction and specifically reserves its rights to challenge the Board's jurisdiction in this regard at the appropriate time and in the appropriate forum." *Id.* at 2.

20. Joint Intervention Motion at 2.

21. Docket 7316, Order of 2/11/10 at 5 (denying intervenor status for Stowe VOIP, LLC).

On balance, I conclude that while VON has a substantial interest that is likely to be affected by the outcome of this proceeding, that interest has and will be adequately protected by other VoIP service providers who are actively participating as parties of record in this docket.

Accordingly, I deny VON's motion to intervene.²² That said, because Phase II of this docket is intended to examine generic regulatory policy proposals of interest to VoIP service providers in Vermont, I invite VON to participate on a limited basis in this Docket as an *Amicus Curiae*, which would entail filing briefs as it deems warranted, pursuant to any briefing schedule that is established in due course.

The Verizon Access Motion

The Verizon Access Motion is nearly identical to the VON Motion in language and substance. The only material difference is that Verizon Access identifies itself as "a competitive local exchange carrier in Vermont [that] offers and provides services in Vermont which the Board might define as VoIP services."²³ In all other respects, Verizon Access has stated the same purpose for seeking intervenor status and has advanced all of the same supporting arguments that were set forth in the VON Motion. Furthermore, like VON, Verizon Access has offered to limit its participation to filing and responding to briefs in order to "minimize the administrative burden" of its intervention on the Board and the parties.²⁴

The Independents oppose Verizon Access' request to intervene, arguing that Verizon Access "has failed to demonstrate that it has any interests unique to it that will not already be protected by the existing parties."²⁵ By contrast, the Department does not oppose the

22. Having reached this conclusion, there is no need, and I therefore do not address, the Independents' concerns about the timeliness of the VON Motion.

23. Verizon Access Motion at 1. The Verizon Access Motion does not specify whether Verizon Access is a "fixed" or a "nomadic" VoIP service provider.

24. Joint Intervention Motion at 2.

25. Independents Reply at 5.

intervention request of Verizon Access, provided that Verizon Access first makes a showing that it is a "fixed" VoIP service provider.²⁶

For the reasons discussed above in connection with VON's intervention request, I conclude that Verizon Access has a substantial interest that is likely to be affected by the outcome of this proceeding. However, I also find that interest has and will be adequately protected by other VoIP service providers who are actively participating as parties of record in this docket. Accordingly, I deny Verizon Access' motion to intervene.²⁷ However, I invite Verizon Access to participate on a limited basis in this Docket as an *Amicus Curiae*, which would entail filing briefs as it deems warranted, pursuant to any briefing schedule that is adopted in due course.

The GMP Motion

GMP seeks to intervene in this case because "Comcast has attachments to GMP utility poles, solely or jointly owned by GMP, utilized by Comcast in the provision of VoIP service." GMP claims it has a substantial interest that may be adversely affected by the outcome of this proceeding because "Comcast and GMP disagree over the appropriate rate payable by Comcast for its attachments to GMP poles."²⁸ GMP acknowledges that other utilities with a similar interest in the applicability of pole attachment fee regulations to VoIP service providers have intervened in this docket to date. Nonetheless, GMP contends that its interest in "the charges for such attachments will not likely be fully protected by others," and that this proceeding provides the "exclusive means" by which GMP can protect that interest.²⁹

No party has opposed GMP's intervention request. GMP has claimed standing to intervene both as of right and on a permissive basis. I do not find that GMP is entitled to

26. DPS Reply at 2. As in the case of VON, Verizon Access has taken no steps to date to clarify whether it provides "fixed" or "nomadic" VoIP service.

27. Having reached the decision to deny intervenor status to VON and Verizon Access for the reasons discussed herein, there is no need and I therefore do not address the Independents' concerns about the timeliness of the intervention requests of VON and Verizon Access.

28. GMP Motion at 3.

29. GMP Motion at 3.

intervene as of right — there are other utility-parties in this docket who have intervened to protect similar regulatory interests, and there are other means by which GMP could pursue its fee dispute with Comcast, such as petitioning for a separate investigation into Comcast's compliance with the Board's pole attachment rules. However, GMP has persuaded me that "its input with respect to the appropriate fee for attachments by VoIP service providers to GMP poles and related issues will facilitate coordination and satisfactory resolution of those issues."³⁰ Accordingly, I grant GMP's motion for leave to intervene on a permissive basis for the purpose of addressing the pole attachment issue identified in its intervention motion.

SO ORDERED.

Dated at Montpelier, Vermont, this 29th day of July, 2011.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: July 29, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

30. GMP Motion at 3.